Supreme Court, U.S.
FILED
MAY 7 1996
CLERK

(4)

No. 95-1576

In The

Supreme Court Of The United States

October Term, 1995

JOAN S. BORAWICK
Petitioner

v.

MORRIE SHAY AND CHRISTINE SHAY
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Counsel of Record:
Helen L. McGonigle
Attorney at Law
P.O. Box 326
Brookfield, CT 06804-0326
(203) 740-0074

MAY 1996

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EDITOR'S NOTE

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STATEMENT OF JURISDICTION

The court of appeals entered judgment on October 17, 1995 and served the Petitioner by mail. On December 29, 1995 it denied this Petitioner's petition for rehearing and suggestion for rehearing *en banc*. In accordance with Rule 13(3), the time for filing this petition for writ of certiorari runs 90 days from the December 29, 1995 denial of the petition for rehearing, and would have expired at 5:00 p.m. on March 28, 1996. Therefore, the petition for writ of certiorari was timely filed on March 28, 1996.

The Petitioner filed a timely petition for rehearing in the court of appeals on October 31, 1995, well before the November 3, 1995 deadline. A timely petition for rehearing with the court of appeals operates to suspend the finality of its judgment and tolls the time for filing a petition for writ of certiorari. In the instant case, the time computation is 90 days from the December 29, 1995 denial of rehearing, or on or before March 28, 1996. The petition for writ of certiorari was timely.

REPLY TO RESPONDENTS' STATEMENT OF THE CASE

The Respondents' incorrectly cast the Petitioner's first timely discovery motion for enlargement of time to take depositions filed with the district court (Resp. Br. 2). This motion for enlargement of time to take depositions was expressly "for purposes of conducting nonparty depositions". The Respondents consented to the motion (R.). The district court's denial of the motion illustrates the difficulty encountered by the Petitioner in developing the record before the district court and on appeal. The Petitioner was prevented in obtaining the corroboration necessary to successfully oppose the Respondents' motion *in limine*.

The Petitioner had a right to engage in discovery under the Federal Rules of Procedure and the district court's standing order. She merely sought an extension of time to take depositions of nonparties as is customary in any civil action. The first timely motion for enlargement was filed four months before the Respondents filed their motion *in limine* and over three months after the discovery deadline expired. Thereafter, the Respondents

obstructed attempts to depose nonparty witnesses and other family members. The Petitioner could not have anticipated the contours of the test set by the Magistrate Judge in her March 24, 1993 ruling rendered eight months after the first timely motion for enlargement. *Borawick v Shay*, 842 F. Supp. 1501 (1994).

The February 10, 1993 motion to take depositions was filed by the Petitioner only 14 days after a ruling on a contested dispositive motion for judgment, and well before the Respondents' motion *in limine* was acted on by the Magistrate Judge (App. to Pet. for Cert. 36A-44A). The Respondents' dispute the Petitioner's assertion that the February 10, 1993 motion was not acted upon (Resp. Br. 2). Despite the Respondents' contention, the record reflects that the motion was not ruled upon by the Magistrate before she granted the Respondents' motion *in limine*. (R.). The Court of Appeals recognized this procedural irregularity stating: "Borawick's second motion to enlarge time for discovery, filed on February 10, 1993, **was not ruled upon**". The motion sought leave to depose out-of-state nonparty witnesses. The Respondents obstructed this attempt to take nonparty depositions by filing an objection on February 19, 1993. The Petitioner was not free to take depositions of corroborating witnesses or to freely engage in discovery after the motion *in limine* was filed or even after the first six months her case was pending in the district court.

The February 10, 1993 motion was withdrawn without prejudice after the Magistrate Judge granted the Respondents' motion *in limine* and because of the Magistrate Judge's refusal to consider corroborative evidence. *Borawick v Shay*, 842 F. Supp. 1501, 1508, n.5 (D. Conn. 1994). The February 10, 1993 motion was renewed after the Petitioner submitted additional corroboration, including the corroborating letters from her younger sister, and immediately after the Magistrate Judge stated in her recommended ruling on Defendants' Motion For Summary Judgment that: "[t]his result is an unfortunate one, in that plaintiff apparently has been unable to develop any independent evidence such as the testimony of her sister". (App. to Pet. for Cert. 36A-44A). Bifurcating decision on many of the critical motions in the case, the renewed motion for enlargement was not referred to the

Magistrate Judge but instead, was retained by the district court judge and denied. (App. to Pet. for Cert. 7A).

There is nothing irrelevant about the information at pages 49A-68A of the Petitioner's Appendix. The affidavit and writing at pages 62A-66A independently corroborate the Petitioner's claims. The newspaper article at page 67A-68A places the Petitioner's family history concerning her father, his abuse of alcohol and felonious conduct in context. This material was included in an addendum with the Petitioner's petition for rehearing. The Petitioner's motion for submission of the addendum was granted by the court of appeals and thus is properly before this court (App. to Resp. Br. 8A).

REPLY

I. THE PETITION FOR REHEARING WAS TIMELY, AND THEREFORE THE PETITION FOR WRIT OF CERTIORARI WAS TIMELY FILED WITH THIS COURT ON MARCH 28, 1996

The Respondents do not dispute that the Petitioner's petition for writ of certiorari was filed on March 28, 1996. They claim the Petitioner is not entitled to the benefit of the 90 day tolling provision contained in Supreme Court Rule 13.3. The tolling rule provides:

> [t]he time to file a petition for writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. Supreme Court Rule 13.3.

The judgment of the court of appeals was filed October

17, 1995 and served upon the Petitioner by mail. The Petitioner filed her petition for rehearing and suggestion for rehearing *en banc*, together with an addendum, fourteen days later by United States Express Mail on October 31, 1996 (R.).

Without any supporting authority, the Respondents argue that the Petition for Rehearing was untimely because, for unsupported reasons, it is not entitled to the benefit of F.R.A.P. 25(a)'s general provision on filing and service. Rule 25(a) provides: "that briefs and appendices are treated as filed on the day of mailing if the most expeditious form of delivery by mail, except special delivery, is used".

The rule for filing a petition for rehearing, F.R.A.P. 40(b), provides: "copies shall be served and *filed* as prescribed by Rule 31(b) for the service and *filing* of *briefs*". Section 31(b) sets forth the procedure for "filing" briefs. The more specific provisions of Rule 31(b) treat a petition for rehearing as a brief for purposes of "filing", and thus the general provision regarding expeditious mail service for briefs contained in F.R.A.P. 25 (a) would apply to petitions for rehearing. Prior to filing the petition for rehearing, counsel for the Petitioner also confirmed with a clerk in the Second Circuit that "filing" on the date a petition for rehearing was mailed by U.S. Express Mail was the customary practice of the court of appeals for petitions for rehearing. This is consistent with the plain language of the rules.

The Respondents cannot seriously argue that F.R.A.P. 25 is inapplicable to the filing of a petition for rehearing. If that were the case, the remaining provisions concerning service of all papers, manner of service, proof of service and number of copies would likewise be inapplicable to the filing of a petition for rehearing. F.R.A.P. 25(b)-(e). This is illogical.

Since the Petitioner was served with the court of appeals judgment by mail, she would also be entitled to an additional three days of mail time per F.R.A.P. 26(c). The petition for

rehearing is a "paper" within the meaning of F.R.A.P. 26(c). With the additional three days, the Petitioner had until November 3, 1995 to file or Express Mail her petition for rehearing. The fact that a motion was later filed by the Petitioner with regard to the addendum is inconsequential. For jurisdictional purposes, the petition for rehearing was timely filed on October 31, 1995. Indeed, the petition for rehearing was filed early.

The identical argument was raised by the Respondents in the court of appeals and not accepted. This argument is further undermined by the fact that the court of appeals allowed the filing of the petition for rehearing, considered it on its merits, treated it as timely, and stayed its mandate until January 5, 1996. F.R.A.P. 41(a) provides that the **timely** filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. The stay of the mandate was considered determinative of the timeliness of a mislabelled petition for rehearing in *Missouri v Jenkins*, 495 U.S. 33, 48-49 (1990).

It is a long held rule that "where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof." *Bowman v. Loperena*, 311 U.S. 262, 266 (1940); *Pfister v. Northern Illinois Finance Corp.*, 317 U.S. 144 (1942). The petition for rehearing tolled the start of the period in which a petition for certiorari must be sought until rehearing is denied. *Missouri v Jenkins*, 495 U.S. 33, 45 (1990); *Department of Banking v. Pink*, 317 U.S. 264, 266 (1942).

The petition for rehearing was denied on December 29, 1995 and the instant petition was timely filed with this court within 90 days, on March 28, 1996. Had the petition been untimely, the Clerk of the Supreme Court was empowered under Supreme Court Rule 13.3 to "refuse any petition for a writ of certiorari which is jurisdictionally out of time". Significantly, the Clerk accepted the petition for writ of certiorari and docketed the case.

II. THE PETITIONER SEEKS REVIEW OF THE COURT OF APPEAL'S ENTIRE TEST, INCLUDING THE FACTOR CONCERNING QUALIFICATIONS OF THE HYPNOTIST; WHO WAS QUALIFIED FOR PURPOSES OF ENABLING THE PETITIONER TO TESTIFY

The Petitioner seeks review of the entire test adopted by the court of appeals, (Pet. for Cert. pp. 21-24), including the credentialling component of the court's multi-factored test. *Id.* at pp. 21-22. The Petitioner has consistently argued that the hypnotist was qualified for purposes of establishing her competency to testify. The hypnotist was capable of performing the hypnosis, and did not add new elements to the Petitioner's memory. (Pet. for Cert. App. 9). Among other things, the Petitioner seeks review of the qualification factor. The record does include a qualified hypnotist (See, Pet. for Cert. pp. 8-9). The hypnosis was performed by a certified hypnotist having nearly 50 years practical experience.

Regardless of whether the hypnotist (St. Regis) was qualified, which he was in this case for the purposes noted, significantly the Respondents make no mention of Fed.R.Evid. 601's requirement that all witnesses shall be competent to testify. Had the Petitioner been hypnotized by an amateur lacking the certification, training and life-time experience of St. Regis, she still should have been permitted to testify under F.R.E. 601.

The Petitioner's citation to cases involving ritual abuse and statutes defining this crime, illustrate the need for review by this court. The "totality of the circumstances test" adopted by the court of appeals is universal in application and applies to persons other than the litigants. The use of hypnotic drugs and hallucinogens to induce hypnosis is expressly addressed in the statutes brought to the attention of this Court. (Pet. for Cert. p. 24). The use of hypnosis can be an aspect of ritual abuse. A

report prepared by the Los Angeles County Commission For Women's Ritual Abuse Task Force states:

> The psychological abuse which is inflicted as part of ritual abuse causes severe mental and emotional suffering to the victims. Victims are subjected to profound terror as well as mind control techniques so severe that most victims dissociate their memories of the experience and lose their sense of will. Some reported examples [are]... mind altering drugs which alter the victim's perception, interfere with the victim's resistance to the assault, and cloud the victim's recall of the details of the abuse. Sophisticated uses of hypnosis, indoctrination, programming, and the use of triggering. *Ritual Abuse: Definitions, Glossary, The Use of Mind Control*, Report of the Ritual Abuse Task Force, Los Angeles County Commission for Women (September 1, 1994).

Contrary to the Respondents' claims at page 7 of Respondents' brief, psychological manipulation, the misuse of hypnotic drugs and hypnosis are conduct characteristic of ritual child abuse. The Continuing Legal Education Division of the South Carolina Bar also has an extensive treatment of ritualistic child abuse in its resource manual for attorneys and guardians ad litem[1]. Citation to these authorities are relevant because of the court of appeal's complete incredulity in ritual child abuse and Petitioner's claims concerning multipertpetrator abuse (Pet. for Cert. App. 29A-30A). Although it was erroneous to do so, the court of appeals deemed these unrelated claims relevant to the issue of the Petitioner's competency to testify. *Id.* at 30A. The Respondents cannot now claim that this subject matter is irrelevant when it was the Respondents who raised these unrelated claims in their motion *in limine* filed under seal in an effort to obfuscate the issues pertaining to the allegations of sexual abuse involving themselves. Moreover, both the court of appeals and the Respondents have inappropriately assumed that the Petitioner's claims with respect to nonparties filed under seal cannot be

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[1] Representing Children In Family Court: A Resource Manual for Attorneys and Guardians Ad Litem (1995).

corroborated. Had the Petitioner's discovery motions been granted, the record would have been more fully developed.

The Petitioner does not claim that human memory is always perfect. What the current scientific research on hypnosis and memory demonstrates is that hypnotic efforts do improve recall under some conditions for some individuals. Hammond, et al, *Clinical Hypnosis and Memory: Guidelines For Clinicians and For Forensic Hypnosis* (American Society of Clinical Hypnosis Press, February 1995) p. 14. After review of numerous scientific studies, the ASCH panel concluded hypnosis was no more likely to contaminate memory than the ordinary processes recognized with eyewitness testimony, interrogative questioning, interviewing, or other forms of suggestion. *Id.* at 22. In other words, legal rules that single out hypnosis for restrictive treatment are scientifically unwarranted. *Id.* at 23.

III. A CONFLICT EXISTS AMONG THE CIRCUITS

The issue of the competency of the Petitioner to testify chronologically following therapeutic hypnosis was of first impression for the Second Circuit. The fact, however, that the court of appeals extended forensic hypnosis precedents to its therapeutic use does creates a definite conflict of authority and raises an issue of compelling public importance. The therapeutic use of hypnosis is so commonplace that this issue is likely to repeat itself in *any* type of case. In addition, by legislative enactment, at least twenty-three jurisdictions toll the statute of limitations for plaintiffs who have repressed memories of childhood sexual abuse. Comment, *Recovered Memories of Childhood Sexual Abuse: The Admissibility Question*, 68 Temple L. Rev., 249, 257 (1995). Moreover, if the decision of the court of appeals is left to stand, it could arise in any civil case and could result in habeas corpus proceedings on this issue. The issue will repeat itself, is of enormous social importance[2] and will create havoc in the mental health community.

[2] The National Institute of Justice estimates the annual cost of child abuse to be $56 billion dollars. *Victim Costs and Consequences A New Look*, 1996. Bureau of Justice Statistics, U.S. Dept of Justice, NCJ-155282, February 1996.

The Respondents dismiss the common law precedent adopted by the Second Circuit in *United States v. Miller*, 411 F.2d 825 (2d Cir. 1969) on the basis that *Miller* was decided before enactment of the Federal Rules of Evidence (Resp. Br. p.9). This contention ignores this court's view of "the pertinence of background common law in interpreting the Rules of Evidence". *Daubert v Merrell Dow Pharmaceuticals*, 113 S.Ct. 2786, 2793 (1993), citing *United States v Abel*, 469 U.S. 45 (1984).

The Respondents incorrectly contend that the district court adopted the approach of the Eighth Circuit in *Sprynczynatyk v General Motors Corp.*, 771 F.2d 1112 (8th Cir. 1985), *cert. denied*, 475 U.S. 1046 (1986). Had the district court adopted the Eighth Circuit's approach, it would have conducted an evidentiary hearing. The district court adopted a "safeguard approach", not the Eighth Circuit's totality of the circumstances test. (Pet. for Cert. App. 8A-9A). Likewise, had the court of appeals followed the Eighth Circuit's approach, it would have remanded for an evidentiary hearing and given the petitioner the opportunity to meet the test. While making passing reference to F.R.E. 104, notably, the Respondents disregard F.R.E.104 (c)'s requirement of a hearing on preliminary matters when the "interests of justice so require".

Biskup v McCaughtry, 20 F.3d 245 (7th Cir. 1994), *cert. denied*, U.S. (March 18, 1996), is not the Seventh Circuit's most recent pronouncement on the subject of hypnosis (Resp. Br. 9). Rather, *Armstrong v Young*, 34 F.3d 421 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 1369 (1995), was decided after *Biskup*. The *dicta* from *Biskup* cited by the Respondents is misquoted and taken out of context (Resp. Br. p. 10). Moreover, *Biskup* is hardly supportive of exclusion of the Petitioner's testimony. In *Biskup*, the Seventh Circuit affirmed denial of a habeas corpus petition approving admission of post-hypnotic testimony despite due process and confrontation clause challenges.

IV. THE PETITIONER'S FIFTH AMENDMENT AND SEVENTH AMENDMENT CLAIMS ARE MERITORIOUS

The Respondents cannot credibly argue that the Petitioner has

no constitutional right to bodily integrity or the right to be free from sexual abuse. While it is duly recognized that this is not a "right to die" case, this court has recognized the fundamental due process liberty interests of an individual to bodily integrity and personal autonomy. *Cruzan v Director*, MDH, 497 U.S. 261, 278 (1990).

Significantly, the Respondents did not address the Petitioner's Seventh Amendment claim of error by the court of appeal in reviewing the content of the petitioner's claims and assessing her credibility. Pet. for Cert. p. 29. The Respondents also did not address the Petitioner's procedural due process claims in being deprived a hearing or the ability to take nonparty depositions. Pet. for Cert. p. 28.

The Respondents argument regarding Fed. R. Evid. 412 is absurd (Resp. Br. 11). Of course the Petitioner did not raise Fed. R. Evid. 412 before the district court, because the rule had not yet been enacted. The rape shield issue was briefed by the Respondent in the court of appeals when the rule was merely proposed (R.). Rule 412 became effective December 1, 1994, before oral argument in the court of appeals. The newly effective rape shield statute, applicable to this pending action, was brought to the attention of the court of appeals during oral argument by counsel for the Petitioner on December 19, 1994. Nevertheless, the court of appeals made no mention of FRE 412 in its decision and did not remand even for this purpose.

CONCLUSION

The petition for a writ of certiorari should be granted.

THE PETITIONER,

HELEN L. MCGONIGLE
Counsel of Record
P.O. Box 326
Brookfield, CT 06804-0326
(203) 740-0074